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CITATIONS.

FEDERAL STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

SHEPARD NILES CRANE AND HOIST CORPORATION,
Petitioner,

v.

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To: The Honorable The Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on December 1, 1948.

Opinions Below.

The opinion of the District Court (R. 143) is reported 72 F. Supp. 239. The opinion of the Circuit Court of Appeals (R. 199-206) is reported in 171 F. (2d) 69.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 1, 1948 (R. 207). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

Whether bonus gratuities, not related to any production factor, such as earnings, efficiency or attendance, given employees retrospectively about every three months in the discretion of and by the separate action of employer's board of directors, in flat sums in varying amounts, without any announcement or promise to employees of payment or continuance of payment and after employees had received regular weekly straight hourly earnings plus incentive earnings plus statutory overtime thereon, are part of an employee's "regular rate at which he is employed" within the meaning of Section 7 (a) of the Fair Labor Standards Act? and,

Whether the mere expectation and reliance of some employees that the employer will pay more bonuses, based on the fact that employer paid bonus gratuities at recurring intervals, over a period of years, makes such bonuses part of the regular rate at which an employee is employed within the meaning of Section 7 (a) of the Fair Labor Standards Act?

Statute Invoked.

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C., sec. 201) are as follows:

Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

For a work week longer than forty hours after the expiration of the second year from * * * (the effective) date (of this section),

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Statement.

Petitioner manufactures cranes and hoists and employs about four hundred people at Montour Falls, New York. Petitioner is engaged in interstate commerce.

On a motion for summary judgment, the District Court found for petitioner, the Court of Appeals for respondent.

The facts are not in dispute with the exception of whether the employees regarded the bonus payments as part of their earnings. Some did (R. 23). Some did not (R. 44-49). The important facts are in the stipulation (R. 10-25) and affidavit of Mr. Buckley, the petitioner's general manager (R. 37-43).

The bonus in question is admittedly not an incentive bonus. However, practically all the production employees of defendant regularly received incentive bonuses during the period covered by this action, and all the employees regularly worked overtime hours. Time and one-half was paid on the incentive earnings for the overtime hours. The "prosperity bonus" which is the subject of this action was paid in addition to the two types of incentive

bonuses (R. 24, 38). It began as a Christmas bonus in 1936 (R. 38, 39), when the defendant arbitrarily divided the employees into four groups according to their base hourly rates, and paid differing lump sums to the employees of each group (R. 11).

The same method of payment was used in the Christmas bonuses of 1937 and 1939. In February, 1940, the Company paid a bonus identical to the previous Christmas bonuses. All other bonus payments thereafter employed the same method. The groups were increased from four to fourteen from the April, 1942, bonus to December, 1944, and to thirteen groups from December, 1944, through June, 1945.

The board of directors of defendant acted upon each bonus payment separately at or near the end of the period preceding the bonus payment and only authorized one bonus payment in each period except for one occasion, August, 1941, when the August and October, 1941, payments were authorized (R. 40-41, 11-15). No bonus was ever promised in advance nor was any formula or plan promulgated by which an employee could determine if a bonus would be paid or what the amount would be. Bonus payments were made after the employees had received their wage payments, including incentive earnings and overtime. No employee who quit or was discharged received a bonus or a portion of a bonus. However, employees who were absent sometimes received all or part of the bonus as the management would decide in its discretion. The amount of the bonus or whether any was to be paid was completely discretionary with the defendant's board of directors. Bonus payments did not relate to wages earned, hours worked, years of service, absenteeism, company earnings or profits, efficiency or quality or quantity of production (R. 37-43) (see analyses, R. 59-142, as to lack of relationship to hours worked or wages).

The only relationship the bonus payments have to base hourly rates is that, although paid in flat amounts, bonus payments varied according to the base pay groupings set up by the employer. For example, in 1941 four base pay groupings were used and amounts of $20.00, $25.00, $30.00 and $35.00 were given employees whose base rates fell within these groups. It was an arbitrary method of making larger gifts to one group of employees than another, as one would give his secretary a larger Christmas present than the office boy. As stated, the employees regularly received incentive earnings and worked overtime hours.

List of "Prosperity" Bonuses Paid

1936, 1937, 1939	One paid each year at Christmas time. Four employee groups received different amounts according to basic hourly rate. Qualifying period—Six months employment. $10.00 paid those employed more than three, less than six months.
1940	Two bonuses paid. 8/29 and 12/29 Identical with previous Christmas bonuses.
1941	Six bonuses paid.
	2/27 Identical with previous bonuses
	5/22 Same
	7/2 Same but $100 additional bonus was given to 20 employees, and $75.00 additional bonus given 7 employees.
	8/28 Same, without additional bonuses
	10/23 Same, except additional bonuses of $100 to 19 employees. $75.00 to 7 employees

12/18 Same except additional bonuses of $100.00 to 21 employees and $75.00 to 5 employees.
Also change in qualifying period; one month service—full bonus. Those employed in December received $10.00

1942 Four bonuses paid.

4/2 Fourteen groups, lowest group receiving $30.00 instead of $20.00 as before and increasing to the top group who received $79.00 instead of $35.00.
$100.00 additional to 24 employees
$75.00 additional to 7 employees
Qualifying period; full bonus if employed three months, otherwise none

7/2 Scale increased to run from $40.00 to $100.00
$100.00 additional to 23 employees
$75.00 additional to 7 employees
No change in qualifying period

10/1 Same, except $125.00 additional to 23 employees, and $100 additional to 8 employees

12/17 Same, except $10.00 to employees of less than three months.

1943 Four bonuses paid; 4/1, 7/1, 9/30 and and 12/16, same amounts as in 12/17 except additional bonuses were

4/1 $125.00 to 23 employees
100.00 to 8 employees
7/1 $125.00 to 24 employees
100.00 to 6 employees
9/30 $125.00 to 20 employees
100.00 to 6 employees

12/16 $125.00 to 19 employees
100.00 to 6 employees
10.00 to employees who had not been employed for three months.

1944 Four bonuses.

With the first bonus of this year, March 30th, the Company gave each employee a notice, Exhibit F (R. 35), informing them that the bonus was "in addition to your regular wage" and that "future bonuses, however, are always uncertain * * *"

3/30 Same as 12/16/43 except $125.00 additional to 18 employees and $100 to six employees and no $10.00 bonuses.

6/29 Same except $100.00 to 5 employees

9/28 Same except $125.00 to 17 employees and $100.00 to 5 employees.

12/21 Notice (R. 58) attached with this bonus "this bonus is not to be confused with wages * * *."

Groups were reduced to thirteen, and amounts paid were reduced.

The new scale was from $32.00 to $80.00.

$100.00 additional was given 17 employees

$75.00 additional was given 5 employees

1945 Two bonuses

3/29 Notice similar to March, 1944 notice (R. 35) included with this bonus (R. 23).

Amounts paid were the same as December, 1944, bonus, except qualifying requirement was six weeks employment.

6/28 The last bonus was accompanied by a notice (R. 58) that the bonus "is not to be confused with regular wages * * *."

Otherwise identical with 3/29 bonus except for one month qualifying period.

An examination of instructions for bonus payments (R. 50-54, 168-189, 55-57) shows many arbitrary changes in the lists of employees who were to receive the additional bonuses, as well as the arbitrary selection of employees who should or should not be paid part or all of the other bonus (R. 57, 168, 179).

The total amount of bonuses paid each period changed constantly. Even if the payments in flat amounts and the changes in qualifying periods are eliminated, until March, 1944, when notices as to the nature of the bonus were individually given the employees, the longest period of bonus payments in the same amounts was from July, 1942, to December, 1943, covering only seven payments. The reason for similarity in these amounts and the amounts paid thereafter was the legal restriction on increasing wages, bonuses, or gifts to employees as ordered by the National Stabilization Board (R. 42).

The conclusion of law by the Court of Appeals is based on the stipulated fact that if *some* (italics ours) of the employees were called upon to testify, they would testify that they expected and relied on the employer to pay bonuses in the future (R. 203-204). There is no showing that this is a reasonable expectation. In view of employer's notices that future bonuses were uncertain (R. 35 and 58), the expectation would seem unreasonable. Nor is there any showing what the expectation was. What bonus amounts did he expect to receive? How often would these amounts be paid?

The Court of Appeals decided this case on the authority of its decisions in *Walling v. Richmond Screw Anchor Co.*, 154 Fed. (2d) 780, and *Walling v. Garlock Packing Co.*, 159 Fed. (2d) 44, certiorari denied, 331 U. S. 820. The *Richmond* and *Garlock* cases have the following important elements in common, none of which are present in the principal case:

1. The bonuses in those cases were begun by action of the board of directors in setting up a continuously operating plan of bonus payments to function permanently in the future, until revoked, without further action on their part.

2. Each employee was informed in advance of the bonus system or plan, its method of computation, and that it was to be a continuous plan.

3. The bonuses were computable by formulae. One related to weekly earnings, the other to dividends paid stockholders.

4. Each bonus system contained incentive elements directly related to the betterment of production. In the *Richmond* case, more production meant more bonus. In the *Garlock* case, more production meant more "dividends," and more years of service meant more imaginary shares of stock, more "dividends," and more experienced employees for the employer.

5. New employees were informed of the bonus system when hired.

6. Bonuses were based on forty hours a week. An employee working less than forty hours received proportionately less bonus.

The *Richmond Screw* and *Garlock* cases are approximate cases of implied contract. There is no implication of implied contract in the principal case. The Court in

the *Garlock* decision, p. 46, in distinguishing it from *Walling v. Frank Adam Electric Co.*, 60 F. Supp. 811, which case is almost identical with the principal case, said:

> "the difference is made pointed by a case such as *Walling v. Frank Adam Electric Company*, 60 F. Supp. 811, cited by defendant, where, as the Court found, the directors on a number of occasions and without a promulgated plan declared bonuses for work already performed, and in amounts only then determined. On the Court's finding there it was certainly more justified than we should be here in concluding that the bonuses fell within the Administrator's first category."

The reference to "the Administrator's first category" relates to the Interpretive Bulletin of the Wage and Hour Administrator, dated September 2, 1941, in which the Administrator said:

> "In bonus plans of the first category, the payment and the amount of the bonus are solely in the discretion of the employer. The sum, if any, is determined by him. The employee has no contract right, express or implied, to any amount. This type of bonus is illustrated by the employer who pays his employee a share of the profits of his business or a lump sum at Christmas time without having previously promised, agreed or arranged to pay such bonus. In such case, the employer determines that a bonus is to be paid, and also sets the amount to be paid. Bonus payments of this type will not be considered a part of the regular rate at which an employee is employed, and need not be included in computing his regular hourly rate of pay and overtime compensation."

In the principal case:

1. Payment and amount were in the sole discretion of the employer.

2. Employees had no contract right, express or implied, to any amount of bonus.

3. The bonuses were never promised, agreed to or arranged for in advance.

4. Bonuses were in lump sums.

Admittedly, the Administrator's releases do not have the force of law, yet they do reflect interpretations by an expert in administering the law and are rightfully given some weight in the determinations of the Courts. *Overnight Motor Co. v. Missel,* 316 U. S. 572, 580, note 17.

The findings of fact by the District Court (R. 166-167) are not disputed by the Circuit Court except as to whether or not the petitioner's method of bonus payment constituted an "arrangement" within the meaning of the Administrator's interpretation above. The undisputed findings include: that the bonuses were gratuities; that they did not relate to production or earnings; that they were discretionary, were never promised or announced in advance of payment; were not determinable by a formula and were not part of a bonus plan.

Thus, the principal case is the first case where bonus payments of a clearly gratuitous nature have been held to be part of the "regular rate at which an employee is employed."

The fact that the defendant deducted Social Security, Victory and Withholding Taxes from the bonus payments and included bonus amounts in computing Workmen's Compensation premiums, and included them in income tax deductions, is without significance in determining whether or not they are part of the regular rate at which an employee is hired. Statutory requirements compel the inclusion of bonuses of all types, gifts and pensions. Internal Revenue Code, Reg. 116, Sec. 405.101; Social Security Act Reg. 90, Article 208.

The decision of the Court of Appeals (R. 202) refers to a letter from the company to employees. A reading of the letter (R. 32) will show that the employer clearly distinguishes between wages and "prosperity bonuses." An examination of Exhibit E (R. 33), referred to in said letter, does not show a payroll slip but a statement of all payments made to the employee as a demonstration to the employee of the company's fair treatment. It was not a representation of wages paid and there is no claim that any employee so regarded it.

With reference to the letter to the War Labor Board mentioned by the Court of Appeals at page 201 of the decision, the letter was written to obtain approval of bonus payments, since bonus payments, gratuitous or otherwise were subject to the Stabilization Law. It was not addressed to nor relied upon by any employee. Its reference to cost of living is disputed by the affidavit of Buckley (R. 42-43). There is no finding of fact with regard to this letter.

Reasons for Granting the Writ.

The decision of the Court of Appeals in the principal case is completely in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walling v. Frank Adam Electric Company,* 163 Fed. (2d) 277. This conflict is recognized by the Circuit Court in the principal case in its decision at page 204, where it said:

> "In *Walling v. Frank Adam Electric Co.,* the Court of Appeals for the Eighth Circuit declined to include bonuses for the purpose of computing the regular rate of pay on the ground that no plan had been promulgated by the company in advance and that the bonuses were all voted at the end of the different periods without obligation for con-

> tinuance. * * * But, as we have already said, we can see no distinction between a 'plan' capable of withdrawal at any time and an arrangement which an employee had every reason to suppose would be continued in absence of some change of circumstances."

In the *Adam* case bonuses were paid quarterly for three and one-half years. Amounts, unlike the principal case, were determined by employee earnings and were ten per cent of straight time earnings for forty hours per week. There was no contract for the bonus, nor arrangement with the employees in advance of payment, nor were they incentive bonuses. The Eighth Circuit concluded such bonuses were not part of the regular rate. In the principal case, the facts were the same, in substance, except that the bonuses in the principal case did not relate to earnings and were not based on forty hours or any other hourly period. *A fortiori,* if the Eighth Circuit is correct, the Second Circuit is wrong.

Further, the decision in the principal case is in apparent conflict with the bases used by the Supreme Court in all relevant decisions as well as in dissenting opinions when they have appeared. The Court and the Justices have emphasized that a contractual relationship between employer and employee should exist for payments to be part of the "regular rate at which he is employed." As stated by Justice Murphy in *Walling v. Youngerman-Reynolds Co.,* 325 U. S. 419 at 425, "the regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the work week exclusive of overtime payments." The same requirement of contract was emphasized in *Walling v. Halliburton Oil Well Cementing Co.,* 331 U. S. 17; *Walling v. Helmerich & Payne,* 323 U. S. 37; *Overnight Motor Co. v. Missel,* 316 U. S. 572; and others.

A clarification of whether Section 7(a) applies to gratuities given over a period is seriously needed. If the Circuit Court is correct in the principal case, thousands of employers have been and are in violation of the act by regularly making gifts of group life insurance premiums, hospitalization benefits, pension donations, as well as Christmas gifts to employees. The criteria of regularity of payment, employee expectation and reliance are all present in these instances. Presently, at least in the Second Circuit, an employer must include all payments, made to or in behalf of an employee, whether wage or gift, as part of the basic forty-hour work week, if such payment is made more than once so as to smack of regularity, or suffer the liabilities of the Act. The Administrator, recognizing that the problem is a vexing one, proposed an amendment to the Act, to the Subcommittee of the House Committee on Education and Labor, on June 11, 1948, which amendment would, among other things, define "regular rate" in such a way as to exclude "sums paid as gifts, * * * the amounts of which are not measured by or dependent on hours worked, production or efficiency" (Wage-Hour Administrator Release of July 27, 1948). However, this proposal was not adopted nor is it part, to the knowledge of the writer, of any current proposed amendment to the Act. Consequently, the general public must rely on judicial interpretation for clarification of the intention of the Legislature.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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